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88-1277

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

No._____

STANLEY V. TUCKER,

Petitioner

-v-

CONNECTICUT NATIONAL BANK, NEIL E. ATLAS, BOURKE G SPELLACY & UPDIKE, KELLY & SPELLACY, P.C.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

STANLEY V. TUCKER
Petitioner
Box 35
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52 pp

QUESTIONS PRESENTED

1. Did 2nd CA violate This Courts rule that property cannot be seized without notice of defenses?

2. Did 2nd CA decide important constitutional question never before decided by this court, i.e. Constitutionality of Ct. P.B. 504 -510?

3. Did 2nd CA violate this courts rule that federal courts have jurisdiction over challenges to state court rules?

4. Did 2nd CA violate its own rule that federal courts have jurisdiction over constitutional issues not litigated in state court?

5. Did 2nd CA conflict with 9th CA & Columbia CA not granting Pro Se leave to amend and statement of amendments needed?

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No _____

STANLEY V. TUCKER,

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-v-

CNB (short title)

PETITION FOR A WRIT OF CERTIORARI TO
THE SECOND CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue review the judgment of the 2nd CA made Nov.2, 1988 dismissing Petitioners Appeal. Timely Motion filed to Certify federal question & denied Nov 2,1988

CITATION TO OPINIONS BELOW

To the knowledge of this Petitioner 2nd C.A. decisions are not reported. The decisions printed in Appendix D - E - F.

JURISDICTION

The judgment of the Second Circuit Court of Appeals entered Nov 2, 1988. The jurisdiction of this court is invoked under Title 28 USC 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a denial of procedural due process and equal protection of the laws the 5th and 14th amendments to the US Constitution, as set forth in Appendix B.

This case involves Conn GS 51-14 which limits state judges to rules of practice. Appendix A.

This case involves challenge to Conn P.B. 504-510 without notice of defenses prior Appendix C. to seizure of private property.

STATEMENT OF THE CASE

This action challenges the constitutionality of Conn. Practice Book 504-510 which permit the seizure of private property without giving debtor notice of

his defenses.

This action challenges Conn P.B. 504-510 on due process grounds as affecting substantial rights and being in violation of Conn. GS 51-14 limiting the state judges to "rules of procedure only"

Petitioner raised his challenge in the District Court of Conn. by civil rights complaint 8-12-87 No amendment allowed. Trial judge dismissed the complaint on grounds he had no jurisdiction and the Petitioner "could have litigated these issues in state court".

On appeal to the 2nd CA Petitioner timely filed his Brief and Appendix. The 2nd CA dismissed on hearsay allegations repudiated under oath by this Petitioner.

Petitioner filed timely motion for certification based on 9th CA decisions reported in news media. Petitioner asked for leave to amend with Trial Court directed to state amendments needed. Certification denied 11-2-88

Thus the constitutional challenge properly raised

in DC and 2nd CA and rejected on erroneous grounds.

FACTUAL BACKGROUND

The respondent bank was able in state court on hearsay motions to obtain a rent receiver under Conn P.B. 504-510 without ever giving this Petitioner notice of his defenses. Bank used the rent receiver for years to build up a mass of unpaid taxes and mortgage and with neglected conditions to seek "strict foreclosure" by low value on properties.

Bank had no right to rents as property worth double $150,000 mortgage balance and sold April 1986 to avoid foreclosure $840,000 Meanwhile Petitioner lost $1,200,000 in rents.

SUBSTANTIAL REASONS FOR GRANTING THE WRIT

I. PETITIONER PRECLUDED FROM RAISING THIS CONSTITUTIONAL CHALLENGE IN CONN SUPREME CT

It is axiomatic that only Connecticut of all the states follows the Conn. Practice Book.

The Connecticut Practice Book limits the Connecticut Supreme Court to review issues raised in the lower court upon trial and almost with no exceptions the court follows this rule.

Connecticut Practice Book Sec 4185 (3065)

Sec. 4185. (Formerly Sec. 3063). Errors Considered

The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court.

State v Reddick
197 Conn at 125

... The defendant has suggested no exceptional circumstances to warrant departure from the general rule that limits appellate review of all issues, even constitutional issues, to those on which the trial court has had an opportunity to rule. Practice Book § 3063; *Knight* v. *Bourbeau,* 194 Conn. 702, 704 n.3, 485 A.2d 919 (1984); *Cain* v. *Moore,* 182 Conn. 470, 472, 438 A.2d 723 (1980), cert. denied, 454 U.S. 844, 102 S. Ct. 157, 70 L. Ed. 2d 129 (1981).

Scholes Agency v Mitchell
191 Conn at 357 See Note 5

"Altho plaintiff briefed an added issue... Plaintiff did not raise issue in trial court... Appellate review therefore precluded"

The Petitioner filed his answer to the state court foreclosure Nov 14, 1977. The federal law changed in 1983 when the Conn. District Court following a line of cases from this court struck down the IRS Intercept Statute for failure to give debtor notice of defenses prior to seizure of property.

Nelson v Regan
560 F Supp 1101
Jan 14, 1983

Constitutional Law 286
Internal Revenue 4973
"Federal state intercept program, under which federal income tax refunds may be transferred to state to extent of taxpayer's past-due support obligations, violated taxpayer's due process rights, in that preintercept notice and postintercept notice failed to meet due process requirements for notice, as neither mentioned possible defenses individual might have to interception of"

See also wage execution. Wright v Tanezio 3-11-83
USDC Conn No 81-353

Conn GS 52-361 fails to provide prior to wage execution... a speedy adequate and meaningful opportunity to be heard at a meaningful time"

Connecticut law on wage executions now amended to ive debtors a form with notice of defenses and pportunity to be heard on these defenses.

ee companion case challenging on same grounds Conn RS intercept statute.

This Petitioner filed his state court pleadings in 1977 based upon state law as it existed. Petitioner filed a sworn statement in lower court that he could not and did not litigate issues brought up in this cases because the law did not exist in 1977. Federal law on notice of defenses to debtors first arose in Conn. in 1983 and while in his appeal this Petitioner tried to raise this issue the Connecticut Supreme Court would not and did not address this issue as it only reviews matters or issues brought up in the Trial Court.

The claim by respondents that this action is a re-litigation is a false claim as is the statement by the District Court that this matter could have been litigated in the state court. The state court proceedings started in 1977 went to final judgment in 1985 and nothing more can be litigated therein.

Wright v Tanezio
USDC Conn No 81-353 3-11-83

Nelson v Regan
560 F Supp 1101

These fundamental cases flow from Mathews v Eldridge, 424 US 319, just as this action.

"Due process requires consideration of:

First - Private interest affected by state
Second - Risk of error in procedures
Third - Government interest in added procedural requirements"

See also cases like Memphis L & P v Craft 436 US I 1978 at p I

"3. Petitioners deprived respondents of an interest in property without due process of law. Pp 12-22

(a) Notice in a case of this kind does not comport with constitutional requirements when it does not ad-vise the customer of the availability of an adminis-trative procedure for protesting a threatened termi-nation of utility services as unjustified, and since no such notice was given respondents, despite "good faith efforts" on their part, they were not accorded due notice. Pp 13-15

(b) Due process requires, at a minimum, the provision of an opportunity for presenting to designated personnel empowered to rectify error a customer's complaint that he is being overcharged or charged for services not rendered, and here such a procedure was not made available to respondents. The customer's interest in not having services terminated is self-"

'evident, the risk of erroneous deprivation of services is not insubstantial, and the utility's interests are not incompatible with affording notice and procedure described above. Mathew v. Eldridge, 424 U. S. 3;9 Pp 16-19"

Where was the 2nd CA in 1978? Did the Justices read the U.S. Reporter? It was not held by this court to be Craft's duty to litigate unknown rights but the duty of Memphis L & P to provide him with opportunity and personnel to correct errors in Craft's complaint.

So here too the 2nd CA wrong in holding or upholding Tucker had to litigate unknown rights in state court - instead it is claimed to be duty of state court judges to notice Tucker of his defenses and give him a chance at a meaningful hearing.

What do the rules do instead. See Appendix C PB 506 allows appointment of rent receiver on hearsay by plaintiff bank's attorney.

II. 2nd CA VIOLATED THIS COURT'S RULING UNKNOWN LAW CAN BE LITIGATED IN FOLLOW ON CASE ONCE LAW IS ESTABLISHED

The 2nd CA upheld District Judge Dorsey's holding that Tucker "could have litigated" unknown law in the state court foreclosure action . But this court has long ago held such a burden cannot be imposed on attorneys let alone pro se litigants who need and are entitled as a due process right to a chance to amend and a statement by District Court of amendments

Curtis Publishing Co v Butts
388 US 143 1966

"Butts makes two arguments in support of his contention that Curtis' failure to raise constitutional defenses amounted to a knowing waiver. The first is that the general state of the law at the time of this trial was such that Curtis should, in the words of the Fifth Circuit majority, have seen "the handwriting on the wall." 351 F. 2d, at 734. We cannot accept this contention. Although our decision in *New York Times* did draw upon earlier precedents in state law, *e. g.*, *Coleman* v. *MacLennan*, 78 Kan. 711, 98 P. 281, and there were intimations in a prior opinion and the extra-judicial comments of one Justice,' that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions

were immune from general constitutional scrutiny.' Given the state of the law prior to our decision in *New York Times*, we do not think it unreasonable for a lawyer trying a case of this kind, where the plaintiff was not even a public official under state law, to have looked solely to the defenses provided by state libel law."

Just like Curtis this Petitioner looked only at established state law in 1977 and after this new federal law established in 1983 commenced timely this action in the District Court of Connecticut.

Curtis Pub Co v Butts
388 US 144 1966

" First, as a general matter, we think it inadvisable to determine whether a "right or privilege" is "known" by relying on information outside the record concerning the special legal knowledge of particular attorneys. Second, even a lawyer fully cognizant of the record and briefs in the *New York Times* litigation might reasonably have expected the resolution of that case to have no impact on this litigation, since the arguments advanced there depended so heavily on the analogy to seditious libel. We think that it was our eventual resolution of *New York Times*, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt."

Was the 2nd CA wrong imposing on this poor pro se litigant a higher standard than that imposed by This Honorable Court on professional attorneys?

May this action be reversed on sound doctrine, in Curtiss, Supra.

III. 2nd CA VIOLATED ITS OWN RULE THAT CONSTITUTIONAL ISSUES NOT LITIGATED IN STATE COURT CAN BE LITIGATED LATER IN FEDERAL COURT

The 2nd CA has long followed the Garguil/Lombard doctrine that says to apply res judicata to constitutional issues that "might have been litigated in state court" is a draculone concept that does not apply to constitutional issues.

Gargiul v Tompkins
794 F 2d at 662
2nd CA 1983

1. Judgment ⇐828(3.42)

While a section 1983 plaintiff may not relitigate constitutional claims actually determined in a prior state court proceeding, prior state court proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in that proceeding. 42 U.S.C.A. § 1983.

A constitutional challenge can never succeed if dismissed..."because it might have been litigated in state court" On pages 4-9 supra Petitioner shows he was precluded from litigating federal issue by Rule 4185 Practice Bk.

Lombard v Bd of Education
502 F 2d 631
2nd CA 1977

1. Judgment ⇐828(3.37)

Prior state proceedings in which teacher contested termination of his employment on ground that board of education had failed to comply with its own bylaws and had acted illegally in terminating teacher's probationary appointment after expiration of probationary term did not bar teacher's subsequent civil rights action against board of education and school principal based upon alleged denial of procedural due process

In the 2nd CA this Petitioner was subjected to the practices of Justice Feinberg's "gas chamber for pro se" litigants. His briefs citing cases from this Honorable United States Supreme Court were not read, his cases ignored. Oral argument denied. His briefs & Appendix cycled and re-cycled in mails. His motion for Certification denied as to his due process rights. The motion to dismiss the appeal was based on hearsay REPUDIATED UNDER OATH BY THIS PETITIONER.

IV. 2ND CA VIOLATED THIS COURT's RULE THAT FEDERAL JURISDICTION EXISTS OVER CHALENGES TO COURT RULES

The District Court dismissed on grounds it lacked jurisdiction to review the state courts judgment whereas this Petitioner asked the District Court to REVIEW AND HOLD UNCONSTITUTIONAL THE STATE COURT RULES.

This is a major error on the part of the judge that he did not see the distinction the Honorable US Supreme Court has made in a line of cases attacking on constitutional grounds state court or state bar rules. This is an all important distinction that the attack is on the state court in its legislative capacity and not in its judicial capacity.

Lathrop v Donahue
357 US at 820 1960

> "Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. Cf. *Hamilton* v. *Regents, supra*, p. 258; *King Manufacturing Co.* v. *City Council, supra*, p. 104. As such, the action had the characteristics of legislation. We conclude that the appeal is cognizable under § 1257 (2). We therefore proceed to the consideration of the merits."

In 1976 This Honorable Court upheld a 1st Amendment challenge to Arizona State Bar prohibiting attorney advertising.

Bates v State Bar of Arizona
433 US at 384

" The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

The judgment of the Supreme Court of Arizona is therefore affirmed in part and reversed in part."

It is so ordered.

In this action the law changed in 1983 to define and affirm due process rights to notice of defenses where their property seized by creditor whereas this Petitioner faced foreclosure under state court rules adopted without jurisdiction and that deny due process of law permitting a creditor bank to seize rents without notice of defenses to debtors 100% ignorant of their defenses. This Honorable Court has again and again upheld jurisdiction over constitutional challenges to state court rules adopted by the Judges in their legislative capacity and not in their judicial capacity.

See E.G. Supreme Court of Virginia v. Consumers Union
446 US 719, 731
Lathrop v Donohue, 367 US at 566
D.C. Court of Appeals v Feldman
460 US at 485 1982

" During the course of its opinion, the Court of Appeals stated:

> "The United States District Court, in denying [the plaintiff] relief, declared that there is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . . *such is not true where review of a state court's adjudication of a particular application is sought.* The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States." *Id.*, at 597 (em-

"The Court of Appeals for the Tenth Circuit in Doe v. Pringle, supra, properly emphasized the distinction between general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission. We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. See, e.g.., Supreme Court of Virginia v. Consumers Union, 446 U. S. 719, 731 (1980); Lathrop v. Donohue, 367 U.S. at 827 (plurality opinion); In re Summers, 325 U. S. at 566.

Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state court judicial decision. In this regard, 28 U. S. C. & 1257 does not 'act as a bar to the district courts consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state court judgments are not implicated.

United States district courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case.

D.C. Court of Appeals v Feldman
460 US at 485 1982

See also Brown v Board of Bar Examiners, 623 F 2d 605 (CA9 1980).

The District Court erred because the use of unconstitutional rules PB 504-510 is made in foreclosure actions by banks and attorneys greedy to seize property by any means fair or foul the District Court thought he was asked to review state court judgments. SUCH IS NOT THE CASE! The District Court was asked to review the constitutionality of Conn Practice Book S 504-510; state court judgments merely an illegal by product of rules that violate the Constitution and Amendments thereto.

V. 2ND CA VIOLATED THIS COURT's RULE ON STANDING.

The ruling below that Petitioner had no standing violated this court's rule.

Simon v Eastern Ky, Welfare Rights Org 426 US at 26 1975

> **"federal plaintiffs must allege some threatened or actual injury resulting from putative illegal action" Linda R S v Richard D 410 US 617**

The Petitioner alleged continuing damages due to loss of $1,200,000 in rents and loss of title by forced sale $300,000 under market price.

Moreover this Petitioner wanted to amend his complaint into two counts, one a count for facial unconstitutionality of Conn P B. 504-510 and two a count for unconstitutionality as applied to this Petitioner by the Bank - CNB in the state foreclosure.

Amendment in federal court is liberality under Rule 15, FRCP, and a Due Process right to Pro Se litigants under doctrine from the 9th CA and Columbia CA. But Petitioner was denied this valuable right by the 2nd C.A.

106 Mile Transport Asso v Koch
656 F Supp at 1480

> "[2] A plaintiff, therefore, must demonstrate that he has suffered some "distinct and palpable injury," that the injury is the result of the defendant's allegedly illegal conduct and that his or her injury is likely to be redressed by relief afforded by the court. *Id.; Matter of Appointment of Independent Counsel*, 766 F.2d 70 (2d Cir.) *cert. denied*, — U.S. —, 106 S.Ct. 569, 88 L.Ed.2d 554 (1985). "

Eldridge v Block
832 F 2d at 1135

" In exercising its discretion with regard to the amendment of pleadings, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981). This court has noted "on several occasions .... that the 'Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), F[ed].R.Civ.P., by freely granting leave to amend when justice so requires.'" *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986) (quoting *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir.1973) (citations omitted). Thus "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *Webb*, 655 F.2d at 979 (citing *Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam)).

[1] This policy is applied even more liberally to pro se litigants. Thus in *Armstrong v. Rushing*, 352 F.2d 836 (9th Cir. 1965), this court established that a pro se litigant bringing a civil rights suit must have an opportunity to amend the complaint to overcome deficiencies unless it is clear that they cannot be overcome by amendment. 352 F.2d at 837 (pro se litigant entitled to procedural protections, including right to amend complaint unless futile); *see Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir.1970) (per curiam). "

VI. ABSTENTION DOCTRINE NOT APPLICABLE

The abstention doctrine lastly pronounced in Pennzoil Co. v Texaco, 55 LW 4457, does not apply here because Tucker no longer has a state court action pending in which to seek his remedy. The foreclosure case in state court had pleadings last filed in 19 and went to final judgment in 1985. No action left to raise these issues of newly formed law in. No longer is appeal possible to the Connecticut Supreme Court but only on discretionary petition for Certification, a matter of discretion to the state court under PB 4126-4133. Regularly the Conn. Sup Ct. dismisses challenges to court rules.

Tucker v American Ins
3 Conn App at 399

> "It would seem that the policy of requiring application for permission to bring suit against the receiver in the original court is so firmly established in this State that a change in the policy should be enunciated either by our Supreme Court or prescribed by statute."

Tucker v American Ins
196 Conn 802 1985

> "The plaintiff's petition for certification for appeal from the Appellate Court, 3 Conn. App. 397, is dismissed."

Appellate Court will not rule without guidance & Sup Ct dismisses challenges to rules. Abstention has no place in this action.

This Honorable Court established a three prong test for Younger abstention that was recently applied by the 9th CA on Sept 9th, 1988 in:

Beltran v California & United Farm Workers
9th CA Nos 87-5942 and 87-5943

" We review *de novo* the district court's refusal to abstain under *Younger*. *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987); *Fresh Int'l Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 & n.2 (9th Cir. 1987).

Younger abstention embodies "a strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). In *Fresh Int'l*, 805 F.2d at 1357-58, we summarized the requirements of *Younger* abstention:

> Under the three-pronged test announced by the Supreme Court in *Middlesex* and applied in *Dayton*, abstention is appropriate in favor of a state proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions.

(citations omitted). This case meets each requirement. Consequently, we hold that the district court erred in refusing to abstain. We consider each criterion in turn. "

Applying this Middlesex test to this case we find abstention not applicable.

This Action	Test 1- State proceedings final 1985 Test 2- No state interest in rent receiver rules of court Test 3- State proceedures inadequate

Conn. uses hearsay as approved in PB 506 (see Appendix C) for appointing and keeping rent receivers so no "meaningful" hearing possible for property owners.

Sup Ct will no longer grant certiorari to review constitutionality of rules. See P 5 Supra

VI RES JUDICATA DOES NOT APPLY BECAUSE FEDERAL LAW CHANGED AND ISSUES AND PARTIES ARE DIFFERENT

With Santa Claus generosity, the District Judge ruled res judicata applied without any showing the facts to be identical the causes of action to be identical and ignoring that the federal law changed since pleadings filed in the four state court foreclosure actions in 1981.

FRCP Rule 8 (c) "In pleading...a party... shall set forth affirmatively..res judicata.."

While in their motion to dismiss defendants raise defense of res judicata their motion unsworn and in opposition Petitioner filed sworn statement that in state court he did not plead the constitutional issues raised herein and that federal law on constitutional issues arose after state court pleadings closed. THE CLAIMED RES JUDICATA DISPUTED UNDER OATH AND NO EVIDENCE TAKEN TO RESOLVE THE DISPUTE - surely the District Court a Santa Claus to the bank and defendants.

Jones v Miller
2 RFD 479 — "Motion to Dismiss on grounds of res judicata denied where facts insufficient to establish question without further facts."

In this action the facts needed to settle the dispute never taken into evidence.

Davis v US Steel
688 F 2d 166
Certiorari Denied
460 US 1014 — "Res Judicata affirmative defense, party claiming it bears burden of proof"

Defendants offered no proof on their disputed defense.

U. S. v Harrison County, Mississippi
399 F 2d 485
Re-Hearing Denied 414 F 2d 787
Certiorari Denied
397 US 918

"In order to sustain plea of res judicata there must be identity of things such as identity of cause of action, identity of persons and parties to the suit, identity of quality and character of person against whom claim is made"

BUT STATE COURT FORECLOSURE DOES NOT MEET THIS TEST.

1. The issue in state court was the state law claims to permit foreclosure.
2. This issue in this case is the unconstitutionality of CT PB 504-510.
3. The defendants in state court include all lien holders not parties to this action.
4. The parties to this action include attorneys who applied the unconstitutional rules to seize property in violation of Constitution.

Muchard v Bereman
307 F 2d 368
Certiorari Denied
371 US 982

"Res Judicata is no defense where between the 1st and 2nd judgment law changed creating a different situation"

The decisions rendered in federal court in Wright, supra, and Nelson, supra (P 6,7 brief) changed law in 1983 to provide a sound legal basis for this federal complaint. That law did not exist in 1977 when state court pleadings closed.

VII. 2ND CA CONFLICT WITH 9TH CA AND COLUMBIA CA ON DUE PROCESS RIGHTS OF PRO SE TO AMEND

In its motion to dismiss the 2nd CA conflicts with 9th and Columbia CA. In its denial of Motion for Certification of federal question on November 2, 1988 the 2nd CA reaffirmed its postion as a GAS CHAMBER FOR PRO SE allowing judgment to enter on unsworn hearsay by the Respondents REJECTED UNDER OATH BY PETITIONER.

Karim-Panahi v Los Angeles Police Dept
839 F 2d 621 9th CA February 1987

> "in pro se civil rights cases court must construe pleading liberally and must afford plaintiff benefit of any doubt; moreover before dismissing pro se complaint for failure to state a claim, district court must give plaintiff statementof complaint's deficiencies. FRCP 12(b)(6) 42 USC 1983."

While the motion to dismiss granted was for failure to state a claim the Trial Judge did not use this ground but used grounds of HIS OWN INVENTION all without leave to amend, without notice.

Noll v Carlson
809 F 2d 1446 at 1448

> " The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel. Indeed, the Supreme Court has held that allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972) (Per Curiam); *see also Maurer v. Individually and as Members of Los Angeles County Sheriff's Dept.*, 691 F.2d 434, 437 (9th Cir.1982); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir.1980). "

This Petitioner would have been delighted if the 2nd CA had reversed with directions to Trial Court to state amendments needed because surely he would have made those amendments.

Broughton v Cutter Labs
622 F 2d at 459

> **" State prisoner was entitled to an opportunity to amend his pro se civil rights complaint so as to attempt to allege facts sufficient to support an action for deliberate indifference to his medical needs; while it was a close question as to whether his complaint was frivolous, dismissal of his complaint was inappropriate. "**

In the lower court this Petitioner was dismissed on grounds of lack of jurisdiction over constitutional challenge to state court rules and on lack of standing although he alleged continuing damages. If he needed a statement of amendments needed he is the first person to admit it and to welcome such a statement.

This case is of importance to all property owners in Connecticut where annually thousands of properties are foreclosed without due process of law. A constitutional challenge can never succeed if dismissed..."because it might have been litigated in state court.."

Bretz v Kelman
773 F 2d at 1027

> "[1] After he was exonerated on the allegedly framed charges, Bretz filed pleadings, which, when liberally construed, allege a cause of action under 42 U.S.C. § 1983 and § 1985.[1] The district court, treating the papers as pleadings which attempted to federalize a routine state tort claim for malicious prosecution and slander, dismissed the claim. A divided panel of this court affirmed. *Bretz v. Kelman*, 722 F.2d 503 (9th Cir.1983), *withdrawn*, 729 F.2d 613 (9th Cir.1984). We took this case en banc along with two other § 1983 prisoner claims because of the importance and complexity of the questions and the doctrinal ambiguity which exists in this circuit over application of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).[2] "

The 2nd CA is in head on conflict with the Columbia CA in holding in a line of cases that Summary Judgement cannot be granted on a Pro Se litigant without giving an explanation of requirements of summary judgement along with leave to amend and time to make the amendments. Summary Judgement, the next step

after a motion to dismiss, is now subject to the same Due Process clause.

Ham v Smith
653 F 2d at 631
Columbia CA
1981

Conclusion

We remand to the district court for fresh consideration of the Government's summary judgment motion. After the Government has submitted an adequate Statement of Material Facts, the district court should explain the nature of the summary judgment motion to Ham and should allow him sufficient time to respond. As noted above, we express no opinion on the merits of the Government's motion.[9] Consideration of the merits here, as in the district court, should await a full airing of the arguments of both parties.

Reversed and remanded.

Philips v US Bd of Parole
352 F 2d at 712
Columbia CA 1965

3. Federal Civil Procedure ⊂=2531

It would be unfair to apply requirements of Federal Rule of Civil Procedure dealing with summary judgment with strict literalness in proceeding by federal prisoner against United States Board of Parole to secure his release from detention on ground that Board had revoked his conditional release from sentence without affording him local revocation hearing, where prisoner had been in custody of federal prison system from inception of litigation and had thus been operating under handicaps of such detention. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

Hudson v Hardy
412 F 2d 1091
Columbia CA 1968

at 1092

12. Federal Civil Procedure ⇐2531, 2547
Court's grant of jail officials' motion for dismissal or in the alternative for summary judgment in declaratory judgment action by indigent prisoner based upon officials' alleged cruel and inhuman treatment was improper where complaint stated cause of action and court failed to adequately advise prisoner of requirements of summary judgment rule and court did not grant hearing or appoint counsel for prisoner. Fed.Rules Civ.Proc. rule 56(e), 28 U.S.C.A.

The powerful importance of giving defenses to debtor prior to seizure of his properties is that Connecticut law forbids to a bank any right to the rents unless and until it can prove a deficiency between market value and mortgage. This ignorant debtor had no notice of knowledge of this and listened in disbelief while Bank secured a rent receiver and watched 10 years in horror while $1,200,000 in rents lost to him. When foreclosure started property worth double $150,000 mortgage balance

When property sold in April 1986 under gun of foreclosure sale for $840,000 $1,200,000 in rents lost altho bank had no right to the rents.

New Haven Savings Bank v General Finance
174 Conn 268
Conn Sup Ct 1978

> "A foreclosing mortgagee can obtain rents collected by a receiver only when the mortgagee can show a deficiency between the amount of the mortgage debt and the value of the mortgaged property"

CONCLUSION

May this Honorable Court summarilly reverse to allow amendment of complaint with District Court to give statement of amendments needed or alternatively note probable jurisdiction.

RESPECTFULLY:

STANLEY V. TUCKER
Petitioner

APPENDIX A- Connecticut General Statute 51-14

§ 51–14. Rules of court. Disapproval of by general assembly. Hearings

(a) The judges of the supreme court, the judges of the appellate court, and the judges of the superior court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits. The rules of the appellate court shall be as consistent as feasible with the rules of the supreme court to promote uniformity in the procedure for the taking of appeals and may dispense, so far as justice to the parties will permit while affording a fair review, with the necessity of printing of records and briefs. Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts. Subject to the provisions of subsection (b), such rules shall become effective on such date as the judges specify but not in any event until sixty days after such promulgation.

APPENDIX B - United States Constitutional Amendments 5th & 14th

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Due Process Clause of Section 1 are set out in this volume and the preceding volume. See the volume containing Amendments 7 to 14 for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 501. Duty of Clerks

The clerks shall see that these rules are enforced and shall promptly report any violations thereof to the court.
(P.B. 1963, Sec. 422.)

Sec. 502. Removal of Receivers

Receivers may be removed at any time, at the pleasure of the court by which they were appointed or, if such court is not in session, by a judge thereof; and, if any receiver is removed or declines to act or dies, the court that appointed him, or, if such court is not in session, a judge thereof, may fill the vacancy. (See Gen. Stat., § 52-513 and annotations.)
(P.B. 1963, Sec. 423.)

Sec. 503. Ancillary Receivers

These rules, so far as applicable, shall govern the appointment and duties of ancillary receivers.
(P.B. 1963, Sec. 424.)

Sec. 504. Receiver of Rents
(P.B. 1963, Sec. 425.)

Sec. 505. ——Applicability of Previous Sections

Sections 485 through 500 shall not apply to receivers of rents.
(P.B. 1963, Sec. 426.)

Sec. 506. ——Appointment

Every application for the appointment of a receiver of rents shall be made in or ancillary to a civil action and may be made either to the court before which such action is pending or, when the court is not in actual session, to a judge in chambers. The court or judge may examine the plaintiff or his attorney and may thereupon appoint a receiver of rents. Notice of the hearing should be given when practical but such appointment may be made without notice if sufficient cause appears.
(P.B. 1963, Sec. 427.)

Sec. 507. ——Bond

No such appointment shall become effective until the receiver shall have filed a bond in such amount as shall have been fixed at the time of his appointment or until said bond shall have been approved by the judge or clerk of the court in which the action is pending; provided that no bond need be required of a bank or trust company. The condition of bonds of such receivers shall be substantially in the following form:

The condition of this obligation is such that, whereas the above named A has by (*court or judge*) been appointed, in an action brought by X against Y, to be receiver of rents of property located in the town of and described as (*describe generally, e.g., No.* 93 *Maple Street*):

Now, therefore, if said A shall well and truly perform his duties under such appointment, then this obligation shall be void, otherwise in full force and effect.

(P.B. 1963, Sec. 428.)

Sec. 508. ——Discharge

Any party in interest may at any time move for the discharge of the receiver.

(P.B. 1963, Sec. 429.)

Sec. 509. ——Orders

The court in which the action is pending, or the appointing judge, may make such orders for the governance of the receiver as circumstances require. The judge shall certify any order passed by him in chambers to the court in which the action may be pending.

(P.B. 1963, Sec. 430.)

Sec. 510. ——Reports

Such receivers shall file written reports quarterly and at such other times as may be required.

(P.B. 1963, Sec. 431.)

APPENDIX D - Decision 2nd CA Dismissing Appeal

United States Court of Appeals

For the SEcond Circuit

TUCKER -v- CONN. NATIONAL BANK	No 88-7590 November 2, 1988

.....it is ORDERED that the motion to dismiss be and hereby is granted.....

APPENDIX E - Decision 2nd CA Denying

Motion to Certify

United States Court of Appeals

For the SEcond Circuit

TUCKER	
-v-	No 88-7590
Conn National Bank	November 2, 1988

.....It is ORDERED that the motion to certify be and hereby is denied.....

APPENDIX F - Decision USDC - Connecticut
Dismisssng Complaint

United States District Court

District of Connecticut

STANLEY V. TUCKER -v- CONN NATIONAL BANK, ET Al.	C.A. No 87-635 (AHN) RULING ON PENDING MOTIONS April 27, 1988

Stanley Tucker, pro se Plaintiff, in this USC 1983 suit challenges the constitutianality of procedures used in Conn. Superior Court for the appointment and designtion of duties of rent receivers in foreclosure action. Tucker sues various parties involved in fore closure of one of his properties. Presently before the court are defendants Rule 12(b)6 FRCP motion to dismiss and plaintiff's Rule 56 FRCP motion for summary judgment.The court grants defendants motion to dismiss in its entirety, as a consequence, plaintiff's motion for summary judgment denied as moot.

I

The complaint is inexpertly drafted, it interweavesfacts and legal argument, but when distilled sketches the following: In 1966 Hartford National Bank (HNB) predicessor to defendant Connecticut National Bank (CNB) issued a construction and permanent mortgage to plaintiff for an apartment building in Torrington, Ct. Ten years later HNB initiated a a foreclosure action against property with Neil Atlas as HNB counsel. During pendency of foreclosure suit the Ct Sup Ct appointed a rent receiver for the property. The rent receiver purportedly managed the property causing economic loss to plaintif. At some unspecified point in litigation, Defendant Bourke Spellacy & his law firm replaced

Atlas as counsel for HNB.

The complaint fails to mention the state court odyssey of the foreclosure action. In its last word on the case, the Ct Sup Ct noted, "This matter has been appealed to this court five times. The first two appeals dismissed, the next two appeals heard on the merits with decisions rendered.. prsent appeal filed Auguts 17, 1981. HNB v Tucker, 195 Conn 218, 220 n.2. Cert. Denied 474 US 845 (1985) (Tucker III). In its summary of the history of the litigation, the Tucker III court provides the facts missing from the interstices of theplaintiff's federal complaint. According to the court, the foreclosure action went to final judgmetn December 2, 1977 and the trial court ordered the sale of Tucker's property at public auction. Tucker appealed to the supreme court. but, on July 24, 1979, it concluded HNB v Tucker 178 Conn 472, cert denied 445 US 904 (1980) (Tucker I) that the superior court committed no error and remanded for the re-scheduling of public sale. Tucker III 195 Conn at 220-221.

On July 27, 1979 HNB filed a motion seeking new date for sale. On August 3, 1979 Tucker filed motion to reargue his a appeal, that motion denied Sept 19, 1979. During pendency of motion to reargue - filing of which is automatically stay enforecement of judgment-superior corut granted HNB July 27 motion and modified Dec 2, 1977 judgment to provide for public sale in October 1979. Tucker appeled from modified judgment. In HNB v Tucker 181 Conn 296 the Supreme Court set aside the modification of judgment as entered without judicial authority and remanded to trial court for scheduling of yet another public sale.
195 at 221. The trial court conducted hearing on value of premises and amount due on debt, the ordered sale October 17, 1981

Tucker's last appeal to supreme court followedshortly thereafter. Id at 221-22

Tucker contended that the superior court erred when it appointed a receiver of rents. Id at 223. The Tucker III court noted that "no appeal lies from the appointment of a receiver of rents in a foreclosure action.." and the review of the appointment "must await an appeal from the final judgment of foreclosure" Id at 223. The Court continued:

> "In this case, the receiver of rents was appointed by the court in 1976, prior to the entry of the judgment of foreclosure Dec 2, 1977. Objections Tucker may have had to the appointment of the rent receiver was raised when he appealed from the judgment of foreclosure of Dec 2, 1977. Since Tucker exercised his right to appeal from the appointment of the rent receiver, we are entitled to presume he had full opportunity to present his claims. Our trial and appellate procedures are not so unreliable that we may n not affore their complete operation any binding effect... To the contrary a final judgment commands respect US v Frady, 456 Us 152

Tucker III 195 Conn at 223 - 24

II

The Plaintiff asserts that the superior court lacked jurisdiction to adopt Conn. P.B. 504-510, the provisions governing appointment and duties of rent receivers. He also alleges that the state court violated his due process rights because 504-510 allegedly do not give notice of defenses nor provide for a "meaningful hearing" where a property owner can challenge the appointment of a receiver. Complaint Para 11. Tucker further alleges the challenged provisions are vague and fail to set forth standards that will

Note - footnotes ommitted.

guide a superior court judge in making such appointment. Be way of relief he seeks a declaratory judgment voiding S 504 510. He also seeks various damages stemming from the depressed rental income and market value of his property; punitive damages; attorneys fees; interest; and costs.

The defendants argue that Tucker is in reality seeking review of the state court judgments and those matters are res judicata before this court. They also argue that plaintiff is collaterally estopped from raising a constitutional challenge to P.B. 504-510 because that issue could have been raised at various intervals in the protracted history of the state court litigation.

III

The Court relies on a persuasive authority from this District in granting the defendants' motion to dismiss. Tucker v Northeast, CA H 87 282(PCD) a case involving Tucker and essencially same issues raised in this adtion, Judge Peter Dorsey found that Tucker's suit was

> no less an attempt to convert an appeal of a state court judgment into a 1983 cause of action. The portions of the complaint which allege plaintiff was deprived of property without due process of law by defendants application of rent receiver procedures of P.B. 504-510 in the state foreclosure proceedings must be dismissed for lack of subject matter jurisdiction.

Id at 8-9 In Northeast Tucker sued corporate successor to the bank that had filed foreclosure actions against four of Tucker properties. He also sued the purchasers of the foreclosed properties and the attorney who had represented bank in foreclosure. Id at 1. Citing District of Columbia Court of Appeals v Feldman 460 US 462 and

Rooker v Fidelity Trust 263 US 413. Judge Dorsy found that a federal district court lacks subject matter jurisdiction to review the final judgment of a state court. Northeast slip op at 5-6. Such review may only be had in the Supreme Court of the United States"Id at 6 See also Sam & Mary Housing Corp v New york 632 F Supp 1448 Judge Dorsey noted that Tucker had raised constitutional due process challenges to P B 504-510 in his appeal from trial court's entry of judgments of strict foreclosure. Id at 3 HFS & L v Tucker, 196 Conn 172, 177/ Cert denied 474 US 920. Because the Ct Sup Ct had determined that Tucker's due process rights were not violated, Judge Dorsey concluded that federal relief sought by Tucker could be awarded only if a federal court found that the state tribunal was wrong. "That this court is without jurisdiction to do" Northeast slip op at 8 (citing Pennzoil Co v Texaco__ US __ 1987.

In the instant case, Tucker also seeks to relitigate state proceedings by naming CNB and its counsel in the foreclosure matters as federal defendants. Though it appears that Tucker did not raise a direct constitutional challenge to P.B. 504 510 during the life span of the state court case, there is nothing before this court to indicate that Tucker was precluded from doing so. As the Conn Sup Ct noted Tucker III - Tucker has "full opportunity to present his claims" during the appellate process. 195 Conn at 224, Moreover Tucker's failure to raise his constitutional challenges in state court does not permit him to raise them now in federal corut. District of Columbia Court of Appeals 460 US at 484 n 16. Thus those portions of the complaint supporting Tucker's claim for relief from the effect

of the state court judgments must be dismissed for lack of subject matter jurisdiction.

In addition to allegations directed at the state court foreclosure action, Tucker also challenges the facial validity of S 504 -510. He alleges that the application of the rent receiver provisions deprives property owners of federally=protected due process rights. Complaint P 10-14. In contrast to federal suits seeking review of state court final judgments, general chall enge to the constitutionality of state laws are within the subject matter jurisdiction of federal courts. District of Columbia Court of Appeals 46o US at 483-84. See also Northeast Savings Slip op at 9. Thus though this court lacks the power to review the state court foreclosure judgment against Tucker, it does possess jurisdiction to address plaintiff's constitutional challenge to Connecticut's rent receiver regulation.

Tucker's request for declaratory relief must fail, however, because the plaintiff lacks standing to seek such relief. Each of his alleged injuries emanates from the state corut proceeding and the purported errors committed therein. "It is elementary that a litigant is not entitled to have a court decide the merits of an issue he raises unless he can show some basis for arguing that the challenged action has caused him a cognizable injury" ASso Against Discrimination in Employment v Bridgeport, 710 F 2d 69, 73. Citing Simon v E Kentucky Welfare Rights 426 US 26, 41. Tucker has fully litigated the foreclosure matter in the state court and has unsuccessfully sought review in the U.S.Supreme Ct. Because the state court foreclosure action

is not reviewable by this court, and because cause there is no allegation that prospective application of S 504-510 will cause the plaintiff redressable harm, Tucker lacks the "distinct and pappable injury"that is a necessary underpinning for standing to pursue a facial challenge to the rent receiver procedures. 106 Mile Transport Associates v Koch, 656 F Supp 1474, 1480 quoting Allen v Wright 468 US 737, 752 1984

CONCLUSION

For the foregoing reasons, the court grants in it entirely the defendant's Rule 12(b) 6 FRCP motion to dismiss. As a result the plaintiff's Rule 56, FRCP, motion for summary judgment is denied as moot.

SO ORDERED this 27th day of April 1988 at Hartford, Connecticut.

s/

ALAN H NEVAS
Judge USDC

Note - Footnotes ommitted.

FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STANLEY V. TUCKER,

Petitioner,

—v.—

CONNECTICUT NATIONAL BANK, NEIL E. ATLAS, BOURKE G. SPELLACY, and UPDIKE, KELLY & SPELLACY, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States District Court for the District of Connecticut have subject matter jurisdiction to review the final decision of the Connecticut Supreme Court?

2. Does the petitioner have standing to challenge the facial validity of rent receivership court rules when the complaint states that petitioner no longer owns the property which could be exposed to the rent receivership rules?

3. When the court concludes that plaintiff lacks standing and the court has no subject matter jurisdiction over plaintiff's claims, must the court offer to let the plaintiff amend his complaint?*

---

* The respondents do not consider the petitioner's first two issues to be properly before this Court because neither the District Court nor the Court of Appeals reached the substantive questions of whether Tucker had any defenses of which he had no notice when the Connecticut Superior Court appointed a rent receiver and of whether Connecticut Practice Book §§ 504-510 are violative of due process on their face.

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LOWER COURT CITATIONS

Stanley V. Tucker v. Connecticut National Bank, et al., Civ. No. H-87-635 (AHN) (April 23, 1988)

Stanley V. Tucker v. Connecticut National Bank, et al., No. 88-7590 (2d Cir. Nov. 2, 1988)

"It is hereby ordered that the motion [to dismiss and for summary affirmance] be and it hereby is granted to the extent of affirming the judgment of the district court."

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Supreme Court Rule 17.1

See text at page 6 of this brief in opposition where Rule is fully reproduced.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the

Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed R. Civ. P. 12(b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim

upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 56(b)

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1277

STANLEY V. TUCKER,

Petitioner,

—v.—

CONNECTICUT NATIONAL BANK, NEIL E. ATLAS, BOURKE G. SPELLACY, and UPDIKE, KELLY & SPELLACY, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

This case has a protracted factual and litigation history.[1] In 1966, Hartford National Bank[2] entered into a note and mortgage with Stanley V. Tucker for an apartment building located in Torrington, Connecticut. In 1976, Neil E. Atlas, Esq. was retained by Hartford National Bank to commence a foreclosure action following default by Tucker on his note obligations. During the long course of the foreclosure proceedings the court appointed rent receivers for the property and heard numerous motions by Tucker seeking to discharge the receivers and challenging the conduct of the receivership.

Judgment of foreclosure was rendered in favor of the bank. *Hartford National Bank and Trust Co. v. Tucker*, No. 25761 (Jud. Dist. Litchfield), *aff'd*, 172 Conn. 675, 364 A.2d 643 (1976). Tucker has appealed this case five times to the Connecticut Supreme Court, along with three unsuccessful attempts to obtain a writ of certiorari to the United States Supreme Court. Tucker's first appeal to the Connecticut Supreme Court was dismissed. *Hartford National Bank and Trust Co. v. Tucker*, 172 Conn. 675, 364 A.2d 643 (1976). His second appeal was also dismissed. *Hartford National Bank and Trust Co. v. Tucker*, 174 Conn. 759, 378 A.2d 1079 (1977). Tucker's third appeal affirmed the trial court's judgment of foreclosure and remanded to set a new date for public sale. *Hartford National Bank & Trust Co. v. Tucker*, 178 Conn. 472, 423 A.2d 141 (1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1079, 63 L.Ed.2d 319 (1980) (*Tucker I*). In Tucker's fourth appeal, the Connecticut Supreme Court set aside a sale made during the appeal and

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1 A succinct history of this case is set forth in *Hartford National Bank and Trust Company v. Stanley Tucker*, 195 Conn. 218, 220, 487 A.2d 528, *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985).

2 The present defendant, Connecticut National Bank, is the successor of Hartford National Bank. Connecticut National Bank is a wholly owned subsidiary of Hartford National Corporation, a Delaware corporation which is a wholly owned subsidiary of Shawmut National Corporation, a Delaware corporation.

remanded for a new sale date. *Hartford National Bank & Trust Co. v. Tucker*, 181 Conn. 296, 435 A.2d 350, *cert. denied*, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 1221 (1980) (*Tucker II*). The fifth time Tucker appealed to the Connecticut Supreme Court, the court specifically approved the conduct of the rent receivership and remanded for a new sale date. *Hartford National Bank & Trust Co. v. Tucker*, 195 Conn. 218, 487 A.2d 528, *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985) (*Tucker III*).

Upon remand from *Tucker III*, prior to a court-ordered sale, Tucker sold the property which was the subject of the litigation for Eight Hundred Forty Thousand Dollars ($840,000.00). Complaint ¶ 17; Second Circuit Joint Appendix A-7.[3] The sale was approved by the Connecticut Superior Court and the proceeds distributed.

STATEMENT OF THE CASE

The petitioner filed suit against Connecticut National Bank, Neil E. Atlas, Bourke G. Spellacy, and Updike, Kelly & Spellacy, P.C.[4] on or about August 12, 1987, seeking "declaratory relief and damages."[5] Complaint ¶ 1; A-1. The respondents filed a motion to dismiss on or about September 4, 1987, on the grounds of *res judicata* and collateral estoppel. On April 27, 1988, the United States District Court for the District of Connecticut, The Honorable Alan H. Nevas, granted "in its entirety the defendants' Rule 12(b)(6), Fed. R. Civ. P. motion to dismiss." Memorandum of Decision 9; A-55. The court held

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3 The "A" citations are to the Appendix filed by the petitioner with the Second Circuit Court of Appeals on September 8, 1988. The petitioner did not file a detailed appendix of the pleadings with the United States Supreme Court.

4 Neil E. Atlas, Esq., Bourke G. Spellacy, Esq. and Updike, Kelly & Spellacy, P.C. were sued only because each represented Connecticut National Bank against the petitioner in the foreclosure actions.

5 Contrary to the suggestions of the petitioner, he never moved for permission to file an amendment to his complaint. Compare Petition p.3.

that "those portions of the complaint supporting Tucker's claim for relief from the effect of the state court judgments must be dismissed for lack of subject matter jurisdiction." Memorandum of Decision 7; A-53 (relying on the similar dismissal in *Tucker v. Northeast Savings, F.A.*, 675 F. Supp. 763 (D. Conn. 1987), *summarily aff'd*, 849 F.2d 1468 (2d Cir. 1988), *petition for cert. filed*, No. 88-719 (U.S. Nov. 7, 1988). The court further concluded that "because there is no allegation that prospective application of [Connecticut Practice Book] sections 504-510 will cause the plaintiff redressable harm, Tucker lacks the 'distinct and palpable injury' that is a necessary underpinning for standing to pursue a facial challenge to the rent receiver procedures." Memorandum of Decision 9; A-55 (footnote and citations omitted). The petitioner moved to vacate or reverse the judgment pursuant to Fed. R. Civ. P. 60(b) on or about May 25, 1988. A-56. The respondent opposed the motion and by decision dated June 20, 1988, the motion was denied. A-57. On June 23, 1988, the petitioner filed a motion for rehearing of the denial of his Rule 60(b) motion; the motion for rehearing was denied on June 28, 1988. A-57.

On July 6, 1988, the petitioner filed an appeal with the United States Court of Appeals for the Second Circuit. The respondent moved for dismissal and summary affirmance on September 22, 1988, which motion was granted by the Second Circuit Court of Appeals on November 2, 1988. The Court of Appeals for the Second Circuit also denied on November 2, 1988, Tucker's motion to certify the case for further appeal. Tucker then petitioned this Honorable Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Plaintiff's Petition for a Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Second Circuit summarily affirming the dismissal of this case by the United States District Court for the District of Connecticut. The District Court correctly held that it had no subject matter jurisdiction to review the final judgment of a state court in the

underlying foreclosure action and the rent receiverships ancillary to the foreclosure. Once the state court avenues were exhausted, the decisions were *res judicata*. The petitioner had a "full opportunity to present his claims" during the nine year state court action. *Hartford National Bank & Trust Co. v. Tucker*, 195 Conn. 218, 224, 487 A.2d 528 (1985), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 258 (1985). The District Court also held that the petitioner, having sold the property at issue, lacked standing in that he failed to demonstrate any prospective losses that would satisfy the standing requirement to challenge the facial validity of the Connecticut Practice Book rules on receiverships. The Connecticut Supreme Court has previously held that those rules accorded the petitioner due process of law and are constitutional both on their face and as applied by the Connecticut Superior Court. *Hartford Federal Savings & Loan Ass'n v. Tucker*, 196 Conn. 172, 491 A.2d 1084, *cert. denied*, 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed.2d 111 (1985).

Nonreview of state court decisions by the United States District Court and actual injury as a requisite for standing are long established principles which present no conflict with other Circuits nor with the Connecticut Supreme Court nor with prior decisions of this Court. Petitioner's suggestion that other Circuits would have permitted him to amend his complaint ignores the facts of those cases and the fact that petitioner has had his (many) days in court on the issues he raises in this lawsuit. The interpretation of Connecticut Practice Book §§ 504-510 on rent receiverships is not an important question of federal law in great need of settlement by this Court. Petitioner has identified no misconduct or aberrant procedure by the lower courts which would warrant exercise of this Court's supervisory powers.

For all of these reasons the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

ARGUMENT

I. TUCKER HAS NOT PRESENTED SPECIAL AND IMPORTANT REASONS SUFFICIENT TO WARRANT THIS COURT'S REVIEW OF HIS CASE

Tucker has petitioned for a writ of certiorari to appeal the decision of the Second Circuit Court of Appeals. He claims jurisdiction pursuant to 28 U.S.C. § 1254(1). Supreme Court Rule 17.1 states as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

No such "special and important" reasons exist. Tucker's complaint alleged that the Superior Court lacked jurisdiction under Connecticut General Statutes § 51-14 to adopt Connecticut Practice Book §§ 504-510. Complaint ¶ 10; A-4. He also

alleged that §§ 504-510 do not give notice of defenses nor provide for a "meaningful hearing" where a property owner can challenge the appointment of a receiver, thus depriving the equitable property owner of due process. Complaint ¶ 11; A-5. Tucker further alleged that Connecticut Practice Book §§ 504-510 were vague and lacking in standards to guide a Superior Court judge in making an appointment of a receiver. Complaint ¶ 12; A-5.

The District Court decision quoted directly from the Honorable Peter C. Dorsey's decision in a nearly identical case involving the very same petitioner. *Tucker v. Northeast Savings, F.A., supra.* In that case, the court found that Tucker's suit was:

> no less an attempt to convert an appeal of a state judgment into a section 1983 cause of action. The portions of the complaint which allege that plaintiff was deprived of property without due process of law by defendants' application of the rent receiver procedures of Practice Book sections 504-510 in the state foreclosure proceedings must be dismissed for lack of subject matter jurisdiction.

Tucker v. Northeast Savings, F.A., 675 F.Supp. at 767. The District Court in this case concluded that "Tucker had 'full opportunity to present his claims' during the appellate process." Memorandum of Decision 7; A-53 (quoting *Tucker III*). Therefore, Tucker's claims for relief from the consequences of the state court judgments were dismissed for lack of subject matter jurisdiction.

The lower court also held that Tucker lacked standing to challenge the facial validity of Connecticut Practice Book §§ 504-510 because his own complaint stated that he no longer owned the property. Complaint ¶ 17; A-7. Thus, he lacked the requisite injury to pursue a declaratory judgment of the facial validity of the challenged Practice Book sections. Memorandum of Decision 8; A-54.

A. The Second Circuit Decision Does not Conflict with Other Circuits

Petitioner cites no other Court of Appeals decisions, much less contrary ones, reviewing Connecticut Practice Book §§ 504-510. The petitioner has made a disingenuous argument that the District Court's decision in this case conflicts with either The Ninth Circuit Court of Appeals or the District of Columbia Court of Appeals, citing *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621 (9th Cir. 1988) and *Ham v. Smith*, 653 F.2d 628 (D.C. Cir. 1981).

In *Karim-Parahi* a *pro se* plaintiff filed a complaint alleging claims under 42 U.S.C. §§ 1983, 1985 and 1986 against the City of Los Angeles, the Los Angeles Police Department and various of their agents and employees arising out of an earlier arrest, strip search and prosecution. He also purported to allege employment discrimination and state law tort claims.

On defendant's motion, the district court dismissed the plaintiff's complaint with leave to amend, ruling that the complaint was vague, ambiguous and unintelligible. "The court explained to Karim-Panahi that the Federal Rules of Civil Procedure require a short, concise, brief statement of your case but the court did not identify any particular deficiencies of the complaint." *Id.* at 623.

Karim-Panahi then amended the complaint which was once again dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The plaintiff failed to set forth in specific language the factual allegations of his complaint. It also contained legal conclusions but no specification of any facts to substantiate the legal claims.

The Ninth Circuit Court of Appeals held that since the defects in the complaint could be cured by amendment that the district court had the obligation to advise the plaintiff of his errors and granted the plaintiff the right to amend.

Ham v. Smith simply held that before "granting summary judgment against a *pro se imprisoned* plaintiff, the district court "at a bare minimum" should give the plaintiff fair notice of the requirements of the summary judgment rule." *Ham v.*

Smith, 653 F.2d 628, 630 (D.C. Cir. 1981) (following *Hudson v. Harvey*, 412 F.2d 1091 (D.C. Cir. 1968)). The court did not expand the rule to require the court in all cases involving a pro se party and a motion for summary judgment to instruct the civil litigant in the legal standards of summary judgment and the party's requirements under Fed. R. Civ. P. 56. Rather, the court rightfully held that in cases involving *prisoners* unrepresented by counsel and subject to detainment they be given "fair notice of the requirements of the summary judgment rule." *Id.* at 1074.

Tucker alleges that, as *pro se* plaintiff,[6] he should have been given the right of amendment prior to dismissal. First, Tucker never moved the court for permission to amend his complaint. Thus it is inaccurate to say that the District Court refused to allow him to amend. Secondly, unless Tucker were to recant the judicial admission from his first complaint that he had sold the property, no amendment of language could restore to him the property interest he lacked to challenge prospectively the rent receivership rules on their face.

The petitioner's case was dismissed by the District Court on grounds of lack of subject matter jurisdiction and standing. Therefore, the decisions of the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit were consistent with the Ninth Circuit and District of Columbia holdings. Neither of the

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6 It is questionable whether the tender mercies traditionally accorded *pro se* litigants are deserved by Tucker who has appealed to the Connecticut Supreme Court, Connecticut Appellate Court or Connecticut Appellate Session at least forty-five times in the past fifteen years and in this dispute alone four times petitioned this Court for a writ of certiorari. *Tucker v. Connecticut National Bank* (this case); *Tucker I, Tucker II, Tucker III*. E.g. *Hartford Federal Savings & Loan Association v. Tucker*, 196 Conn. 172, 491 A.2d 1084 (1985); *Tucker v. Connecticut Ins. Placement Facility*, 192 Conn. 653, 473 A.2d 1210 (1984); *Burritt Mut. Sav. Bank of New Britain v. Tucker*, 183 Conn. 369, 439 A.2d 396 (1981); *Hartford Federal Savings & Loan Ass'n v. Tucker*, 181 Conn. 607, 436 A.2d 1259 (1980); *Mechanics Sav. Bank v. Tucker*, 178 Conn. 640, 425 A.2d 124 (1979); *City of Hartford v. Stanley Tucker, et al.*, 174 Conn. 792, 381 A.2d 1369 (1978).

grounds that the District Court here used for dismissal were capable of being perfected by amendment. Even if the petitioner had been denied his non-existent request to amend, it too would not have been sufficient to warrant a reversal of the case.

B. The Second Circuit Decision Does Not Conflict With The Connecticut Supreme Court

The Connecticut Supreme Court has repeatedly upheld the application of the rent receivership rules as applied to Tucker's properties. In this very same dispute the Court said:

> Since the defendant exercised his right to appeal from the appointment of the rent receiver, we are entitled to presume that he had a full opportunity to present his claims.
>
> . . . .
>
> Not only did the trial court have the authority to continue the receivership and to "modify any such order" as necessary, but also to "make any such order in the action as the exigencies of the case may require." General Statutes § 52-504; *see also* Practice Book § 509.
>
> . . . .
>
> This litigation has lasted nine years. There is no longer any reason to prolong this case into the indefinite future by allowing the defendant a roving inquiry into irrelevant matter in the subsequent proceedings. Our mandate properly interpreted in the light of prior decisions of this Court and the applicable statute directs the route to be followed.

Tucker III at 224-225.

The Connecticut Supreme Court has also rebuffed Tucker's attempts in state court to sue the rent receivers, attorneys and foreclosing parties connected with the rent receiverships placed on Tucker's properties. *Tucker v. Helco*, 13 Conn. App. 825, 539 A.2d 148, *cert. denied*, 207 Conn. 811, 541 A.2d 1241 (1988); *Tucker v. American Insurance Company*, 3 Conn. App. 397, 488 A.2d 1278, *cert. dismissed*, 196 Conn. 802 (1985); *Tucker v. Pinney*, 8 Conn. L. Trib. No. 51, p.15, 17 (1982), *aff'd*, 3 Conn. App. 678, 490 A.2d 1032, *cert. denied*, 197

Conn. 804, 499 A.2d 56 (1985); *Hartford Federal Savings & Loan Assn. v. Tucker*, 196 Conn. 172, 177, 491 A.2d 1084, *cert. denied*, 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed. 2d 258 (1985).

Tucker cites no decisions of the Connecticut Supreme Court which would permit him to relitigate in this case the propriety of the conduct of the rent receivers in the underlying state court foreclosure action, which conduct was supervised and approved by the Connecticut Superior and Supreme Courts. *Tucker III* at 225. Connecticut also maintains a rule of standing which requires the plaintiff to be exposed to an actual injury of his own before he can challenge the facial validity of a legislative enactment. *Husti v. Zuckerman Property Enterprises Ltd.*, 199 Conn. 557, 508 A.2d 735 (1986). There is no conflict between the Connecticut Supreme Court and the decisions in this case of the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit.

C. The Lower Court Proceedings Were Ordinary

The supervisory power of this Court is properly invoked upon a petition for writ of certiorari only when the conduct of the lower courts is totally outside the bounds of civilized judicial demeanor or conduct of the proceedings. See Supreme Court Rule 17.1.

Petitioner has not documented any such outrageous conduct by the lower courts. The procedure was quite routine. In response to plaintiff's complaint, defendants filed a motion to dismiss which on the face of the papers stated defendants' intent that it be treated as a summary judgment motion pursuant to Fed. R. Civ. P. 12(b) and 56(b). A-27. Plaintiff filed an opposing brief and his own summary judgment motion with a brief and affidavit. A-33. The District Court ruled on these motions as they were presented. Tucker gave the District Court two additional opportunities to consider the issues, by way of motion to vacate the judgment and motion for rehearing of the motion to vacate. Upon such further consideration the court declined to change its decision. Similarly at the Second Circuit level Tucker filed his main brief and a brief in opposition to

defendants' motion to dismiss and for summary affirmance. The posture of the case did not call for evidentiary hearings. No jury was involved. Inflamed passions were not and could not have been an issue. This is simply a textbook example of reasoned disposal according to standard procedure of a claim which never should have been brought.

D. No Federal Statute Is In Issue

This whole case revolves around the procedural rules of one state's courts. Plaintiff has not challenged any federal statute. Neither novelty nor the characterization of an "important question of federal law" applies to the principle that Tucker may not relitigate in federal court whether the state court judges were correct in their supervision of the rent receivers on property formerly owned by Tucker. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). This case in no way involves any of the issues or conflicts set forth in Supreme Court Rule 17.1.

The respondents recognize that Rule 17.1(a)-(c) is not intended to circumscribe the scope of this Honorable Court's discretion in deciding to entertain a petitioner's writ for certiorari. However, petitioner identifies no "special and important" reason to grant this petition. Moreover, the petitioner's previous attempts to bring these same issues to this Court by way of petition for writ of certiorari were denied.[7] *Tucker I*; *Tucker II*; *Tucker III*.

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7 For example, among the issues raised by Tucker in his 1985 Petition for Writ of Certiorari in Tucker III are:

Did the Connecticut Supreme Court rule contrary to the opinion of this Court in appointment of substitute rent receiver WITHOUT DUE NOTICE including notice of state and federal defenses

Did the Connecticut Supreme Court rule contrary to the opinion of this court in appointment of substitute rent receiver WITHOUT DUE NOTICE including notice of speedy mechanism to terminate with damages and counsel fees a reteiver incompetent or negligent

Did the Connecticut Supreme Court rule contrary to the opinion of this court in appointment of substitute rent receiver WITHOUT EQUAL PROTECTION by denying to Owner right to post equal bond and be rent receiver of property he owns

II. THE PETITIONER HAS FULLY LITIGATED THE CONSTITUTIONALITY OF CONNECTICUT PRACTICE BOOK SECTIONS 504-510

It is extraordinarily difficult to decipher Tucker's petition for a writ of certiorari due to its lack of appropriate form and haphazard drafting. The petitioner has apparently once again alleged that he was precluded from raising a constitutional challenge to Connecticut Practice Book §§ 504-510 during the decade of litigation in the state judicial system. This is simply not the truth. The Connecticut Supreme Court held that Tucker had the "full opportunity to raise his claims during the trial and appellate process." *Tucker III* at 224. Moreover, the Connecticut Supreme Court has specifically held that the rent receiver rules are constitutional. *Hartford Federal Savings & Loan Ass'n v. Tucker*, 196 Conn. 172, 176, 491 A.2d 1094, *cert. denied*, 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed. 2d 258 (1985).

> Due process does not mandate a particular procedure but rather requires only that certain safeguards exist in whatever procedural form is afforded. *See Fermont Division v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979), and cases cited therein. The fourteenth amendment prohibits the state from denying any person life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. *United States v. Cruikshank*, 92 U.S. 542, 554, 23 L.Ed. 588 (1876). The amendment "in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives rea-

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Did the Connecticut Supreme Court rule contrary to the opinion of this Court by appointment of substitute rent receiver WITHOUT DUE PROCESS consisting of notice and hearing as to qualifications

Did the Connecticut Supreme Court rule contrary to the opinion of this Court in permitting a re-litigation of mortgage ALREADY MERGED INTO JUDGMENT

Did the Connecticut Supreme Court rule contrary to the opinion of this Court DENYING EQUAL PROTECTION by refusing Petitioner a hearing on Set Off of claims against the Bank

> sonable notice and affords fair opportunity to be heard before the issues are decided." *Iowa Central Ry. Co. v. Iowa*, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed 467 (1896). That opportunity is amply afforded by the rules under attack. In the first place, every application for the appointment of a receiver of rents shall be made in or ancillary to a civil action and no appointment may be made without notice unless sufficient cause appears. Practice Book Section 506. Moreover, there is no violation of due process when a party in interest is given the opportunity at a meaningful time for a court hearing to litigate the question of appointment of a receiver. In view of these safeguards we find unpersuasive the defendant's argument that the rules for appointment of a receiver of rents are unconstitutional.

Hartford Federal Savings & Loan Ass'n v. Tucker, 196 Conn. at 176. See also *Tucker III* at 223.

The District Court recognized that even if Tucker didn't explicitly challenge Practice Book §§ 504-510 on his current constitutional grounds during the life span of the state court case, "there was nothing before this court to indicate that Tucker was precluded from doing so." Memorandum of Decision 7; A-53. Under the doctrine of *res judicata*, or claim preclusion, a judgment is final not only as to every matter which was offered to prove the claim, but also as to any other admissible matter which might have been offered for that purpose. *Cromwell v. County of Sac*, 94 U.S. 351, 352-53, 24 L.Ed. 195 (1876). *In Friarton Estates Corp. v. City of New York*, 681 F.2d 150 (2d Cir. 1982), the Second Circuit Court of Appeals held that where the constitutional claims presented in a § 1983 action (arising, incidentally, from foreclosure suits) had already been made both in state appellate proceedings and by petition for certiorari to the United States Supreme Court, the contentions were *res judicata*, warranting dismissal of the § 1983 action. The court wrote:

> All the constitutional contentions. . . were advanced not once but time and time again at each of the three levels of

> the New York court system and on petition for certiorari to the United States Supreme Court. It is of no consequence whether the district court or this court agrees or disagrees with the determinations of the New York courts on issues fully raised before and necessarily decided by them. *Res judicata* protects wrong decisions as well as right ones. It is immaterial that the questions were constitutional in character. . . or that they are now asserted under 42 U.S.C. § 1983. . .

Friarton Estates Corp. v. City of New York, 681 F.2d at 158. This Court has confirmed the view that state court decisions on constitutional issues are *res judicata* of the same issues raised in federal § 1983 actions. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83-85, 104 S.Ct. 892, 79 L.Ed.2d 56 (1983), *aff'g*, 703 F.2d 564 (6th Cir. 1982). *See also Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Therefore, the District Court correctly dismissed the case for lack of subject matter jurisdiction and the United States Court of Appeals for the Second Circuit did not err in affirming the dismissal.

The petitioner has also claimed that the case of *Nelson v. Regan*, 560 F. Supp. 1101 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 175, 83 L.Ed.2d 110 (1984) changed the law on rent receivership in early 1983 by imposing a new due process requirement, specifically, that the defendant be given notice of defenses. The District of Connecticut held that where a constitutionally protected property right is in jeopardy due to government action, "[a] clear and detailed deprivation notice, specifying the possible defenses and procedures for asserting those defenses is necessary to afford due process protection. . ." *Nelson v. Regan*, 560 F.Supp. at 1107; *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Inasmuch as Tucker's Connecticut Supreme Court appeal was not argued until February, 1985, he was constructively aware of this change in the law and could have asked the court

to aprise him of any available defenses of which he might otherwise have been ignorant. *Tucker III.* See *Tucker v. Northeast Savings, F.A., supra* at 766. In any case, the petitioner never identified any defenses of which he was unaware and should have been notified. It is simply not credible that the petitioner was really unaware of applicable defenses at the time the receivers of rent were appointed or the numerous occasions when he sought to have them discharged. Case law of long standing clearly set out those defenses. *See Silver v. Kingston Realty Corp.*, 114 Conn. 349, 158 A. 889 (1932) (sufficiency of foreclosing party's security in property); *Williams v. Robinson*, 16 Conn. 517 (1844) (foreclosing party in possession or legally capable of gaining possession of property). As a habitual *pro se* litigant and not one of those who are "relatively uneducated and uninformed about their legal rights" that *Nelson v. Regan, supra*, aims to protect, Tucker surely was aware of, or had reasonable access to, these cases. Accordingly, even if *Nelson v. Regan* were applicable, the appellant could not and has not demonstrated the lack of notice which that case proscribes.

The petitioner also claims that the District Court erred in ruling that Tucker lacked standing to seek declaratory relief on the facial validity of Practice Book §§ 504-510. Specifically, the court held:

> Tucker has fully litigated the foreclosure matter in state court and has unsuccessfully sought review in the United States Supreme Court. . . (b)ecause there is no allegation that prospective application of sections 504-510 will cause the plaintiff reversable harm, Tucker lacks the "distinct and palpable injury" that is a necessary underpinning for standing to pursue a facial challenge to the rent receiver procedure. *106 Mile Transport Associates v. Koch*, 656 F. Supp. 1474, 1480 (S.D.N.Y. 1987) (quoting *Allen v. Wright* 468 U.S. 737, 752 (1984)).

Memorandum of Decision 9; A-54-55. Tucker admits that he sold the property at private sale in April, 1986. Complaint ¶ 17; A-7; Memorandum of Decision 9n.3; A-55. There is no allegation that prospective application of the rent receiver rules will

cause him any actual and imminent injury from these defendants. Therefore, it is clear that the petitioner has no standing to challenge the constitutionality of Connecticut Practice Book §§ 504-510. See, *Northeast Bancorp, Inc. v. Woolf*, 576 F. Supp. 1225, 1232 (D. Conn. 1983), *aff'd*, 742 F.2d 1439 (2d Cir. 1984). The cases cited by the petitioner in the petition for a writ of certiorari fully support the position of the respondents. See Petition p. 18-20.

III. THE ROOKER-FELDMAN ABSTENTION DOCTRINE PRECLUDED SUBJECT MATTER JURISDICTION TO THE UNITED STATES DISTRICT COURT

The petitioner also alleges that the abstention doctrine is not applicable in this case. Petition p. 21. The respondents did not raise the abstention doctrine in the District Court or the Court of Appeals. However, as the abstention doctrine would further support the District Court decision, the respondents present the following discussion.

In instituting this § 1983 suit in the federal District Court, the plaintiff sought a ruling that the Supreme Court of Connecticut, in holding the rent receiver rules constitutional as applied and on their face, was wrong. He sought review of the decision of a state court. The proper means of obtaining such a review are by petition for writ of certiorari or by direct appeal to the United States Supreme Court.[8]

This Court has delineated the jurisdictional boundaries: "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this court." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Petitioner himself was a party to most of the recent cases upholding the constitutionality of the rent receiver rules. *Hartford Federal Savings & Loan Ass'n v. Tucker*, *supra*, and cases cited. Thus, he has had, and

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8 The United States Supreme Court has, in fact, denied certiorari, in this dispute three times. See 445 U.S. 904, 100 S.Ct. 1079, 63 L.Ed.2d 319 (1980); 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 1221 (1980); 474 U.S. 845, 100 S.Ct. 135, 88 L.Ed.2d 258 (1985)

in many cases has taken, the opportunity to seek direct review of the state court decisions which he now seeks to collaterally attack.

In *Rooker v. Fidelity Trust Company*, 243 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) this Court refused to permit a losing state court litigant to invoke federal jurisdiction to attack a state court judgment on the ground that it had unconstitutionally misapplied state law. The Court held that an appeal through the state courts to the Supreme Court constituted the exclusive procedure by which the judgment might be reviewed for constitutional error.

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding . . . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character . . . To do so would be an exercise of appellate jurisdiction.

Rooker v. Fidelity Trust Co., 263 U.S. at 415-416.

In *Feldman*, this Court repeated the principles of Rooker, stating:

> The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review the final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257. See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1141 (2d Cir. 1986).

District Of Columbia Court of Appeals v. Feldman, 460 U.S. at 476.

A disclaimer of jurisdiction by a federal district court under *Feldman* is not a discretionary extension of the *Younger* abstention doctrine. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971). The *Younger* doctrine is intended only to avoid the risk of federal judicial interference with *ongoing* state proceedings. As all state proceedings have long been concluded in the instant case, *Younger* abstention is simply inapplicable. *American Disposal Services, Inc. v. O'Brien*, 1988 U.S. App. LEXIS 1805, slip opinion, p. 8 (2d Cir. Feb 8, 1988). See also *Younger v. Harris*, 401 U.S. 37 (1971).

Feldman, on the other hand, applies independently of *Younger*, and bars federal subject-matter jurisdiction in this case. Unlike *Younger*, *Feldman* enunciates a *mandatory* construction of 28 U.S.C. § 1257, which sets forth the various avenues for review, of state supreme court decisions by the United States Supreme Court. Thus, the Second Circuit Court of Appeals held that the doctrine of *Feldman* and its ancestor, *Rooker v. Fidelity Trust Co.*

> stems from recognition that (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions, . . . (2) a path is available through the state appellate system to the Supreme Court, and that (3) waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal court intervened to overrule a state court decision. . .-.

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (citations omitted). The court concluded that "[t]he severability of these claims by [state] appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. Section 1257 *precludes* an inferior federal court from exercising jurisdiction over them." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d at 1143 (emphasis added).

It follows, *a fortiori*, that past review (as well as prospective reviewability) by the State of Connecticut Supreme Court also precludes subject-matter jurisdiction. As the Second Circuit

Court of Appeals noted in *Pennzoil*, "the state court judgments in *Rooker* and *Feldman* had survived appeal in the state court system." 784 F.2d at 1142. Indeed, while the *Younger* abstentation doctrine may act only to *delay* federal district court subject-matter jurisdiction pending the completion of the state court proceedings, the *Rooker-Feldman* principle absolutely *forecloses* such jurisdiction where such proceedings have already been concluded holding the challenged statute or behavior constitutional and United States Supreme Court review was either available or had been denied. *Compare Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1528, 95 L.Ed.2d 1 (1987) *with Texaco, Inc. v. Pennzoil Co.*, *supra*, 784 F.2d at 1141-43.

Neither the respondent, the District Court nor the Second Circuit Court of Appeals relied upon the *Rooker-Feldman* doctrine. However, it supports the District Court's decision that the court lacked subject matter jurisdiction over petitioner's damages claims arising from the conduct of the rent receivers supervised by the Connecticut courts.

CONCLUSION

For nearly a decade and a half in every possible forum Stanley V. Tucker has challenged the appointment and conduct of court appointed rent receivers on his property in foreclosure. The United States District Court properly concluded that he has had his day in court and that it is not the function of the federal trial court to review the decisions of the Connecticut Supreme Court approving the conduct of those receiverships and upholding the validity and constitutionality of the Connecticut Practice Book rules governing receiverships. Having sold the property in question, Tucker has no present or prospective risk of being subjected by these defendants to the receivership rules. Thus, he lacks standing to challenge the facial constitutionality of those rules and the District Court correctly so held. The United States Court of Appeals for the Second Circuit found so little merit in Tucker's claims that it summarily affirmed the District Court's decision.

Tucker now petitions to have this court review his case. As discussed above, the decisions of the Second Circuit and District Court present no conflict between the Circuits nor with the Connecticut Supreme Court nor any new, important question of federal law which would justify acceptance of this case. Petitioner simply disagrees with the numerous courts which have ruled against him.

Respondents, Connecticut National Bank, Neil E. Atlas, Bourke G. Spellacy, and Updike, Kelly & Spellacy, P.C., respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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